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No. 80-5227

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

CHERYL MAFFEY,

Appellant,

v.

STATE OF OREGON ex rel JUVENILE DEPARTMENT OF KLAMATH COUNTY,

Appellee.

On Appeal From the Court of Appeals of Oregon

MOTION TO DISMISS OR AFFIRM

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QUESTION PRESENTED

Appellee State of Oregon disagrees with appellant's statement of the question presented, and submits instead the following as the question presented on appeal:

Was appellant denied due process when her parental rights to her child Noel Barefoot Wright were permanently terminated upon the trial court's finding that the state proved the substantive statutory requirements for termination by clear and convincing evidence?

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MOTION TO DISMISS OR AFFIRM

Appellee, State of Oregon, moves, pursuant to Rule 16, for an order dismissing the appeal in this case, on the ground that the judgment rests on an adequate state ground. In the alternative, appellee moves for an order affirming the judgment, on the ground that appellant has not shown that the Oregon Court of Appeals incorrectly decided a federal question. If this Court notes probable jurisdiction in this case, appellee moves for an order consolidating it with Santosky v. Kramer, No. 80-5889, for purposes of oral argument.

OPINIONS BELOW

Appellant's statement is accepted.

JURISDICTION

Appellant asserts that the issue in this case is whether the Oregon statute which permits the permanent termination of the parent-child relationship by the application of the preponderance of evidence standard is valid under the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Under appellant's formulation of the question presented, jurisdiction of this Court would be based upon 28 U.S.C. § 1257(2). As more fully explained below, however, the trial court found that the State of Oregon proved its case by clear and convincing evidence. Consequently, the constitutionality of the preponderance standard prescribed by the Oregon statute is not in issue. Rather, the issue is whether the termination of appellant's parental rights under proof by clear and convincing evidence denied her due process. This Court lacks jurisdiction to entertain that question on appeal. Under 28 U.S.C. § 2103, appellant's Jurisdictional Statement should be treated as a petition for writ of certiorari pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES

Appellant's statement is accepted.

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STATEMENT OF THE CASE

Because appellant's statement of facts omits much of the state's evidence in favor of permanent termination of her parental rights in her child, Noelle Barfoot Wright, appellee supplements that statement of facts as follows.

Mrs. Maffey suffers from chronic schizophrenia. (Tr. 318.) The prognosis for Mrs. Maffey is that there is a substantial likelihood that she will experience the recurrence of an acute psychotic episode requiring extended hospitalization within one year to eighteen months. (Tr. 324-328.) At the time of trial Mrs. Maffey was taking prescription anti-psychotic medication, anti-depressant medication, and medication to combat the side effects of the other two drugs. (Tr. 345.) Mrs. Maffey had been continuously under the care of a psychiatrist, Dr. McCook, for the seven months prior to the trial. (Tr. 345). During the preceeding year, Mrs. Maffey was continuously under the care of another psychiatrist, Dr. Wayland. (Tr. 831-832.) Mrs. Maffey's extensive history of psychiatric hospitalizations began in 1962, when she was fourteen years old. During the next sixteen years, Mrs. Maffey was hospitalized more than nineteen times. (Tr. 51-58, 75-79, 1121-1127, Child's Exhibit 9.) Her psychiatric history also includes several suicide attempts, such as incidents of cutting her wrists, taking overdoses of drugs, and setting fire to herself. (Tr. 121-123.)

Although, at the time of trial, she was still married to her second husband, Mr. Maffey, Mrs. Maffey testified that she had been living with one Leonard Husky, the father of her fourth child, Sonny, for the preceding six months. (Tr. 47, 1102.) She acknowledged that Mr. Husky was a source of problems for her in that he had a drinking problem, he did not always come home, and he had recently assaulted her. (Tr. 1102, 1104, 1130.) Mrs.

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Maffey testified that she currently drinks occasionally. (Tr. 124.) She previously acknowledged to her caseworker that she was an alcoholic and that she had spent time as an inpatient in an alcohol rehabilitation half-way house. (Tr. 462, 500.) Mrs. Maffey has a history of chronic episodic alcohol abuse. (Tr. 314.) During the seven months preceding the trial Mrs. Maffey had three different jobs. (Tr. 85-86.) She lived in nineteen different places during the preceding five years (excluding hospitalizations); and the longest period she remained in a single residence was ten months. (Tr. 88, 137). During this ten month period from August 1976 to June 1977, Noel was in foster care. (Child's Exhibit 9).

The State's involvement in Mrs. Maffey's relationship with her children predated the birth of Noel Barefoot Wright. Her older children, Tonya and Stormy, were placed in foster care from December, 1971 until October, 1973. (Tr. 231-232, 250, 252, 889.) Noel was born on December 18, 1973. (Tr. 45.) He turned five during the trial and celebrated his fifth birthday in a foster home. During his five years he had eight different foster placements. He lived continuously with Mrs. Maffey without a major disruption of his placement with her only for six and one-half months and he lived in foster homes for thirty months of his life. (Tr. 804-806, 837-838, 1120-1126, Child's Exhibit 9). Noel never bonded with or formed an attachment to Mrs. Maffey, and he viewed his former foster mother as his psychological mother. (Tr. 804-810). As a result of his frequent placements and Mrs. Maffey's incapacity, Noel, although potentially of high intellect, suffered substantial emotional stress which he repressed and internalized. An evaluating psychologist noted that Noel was highly anxious and reverted to immature behavior. (Tr. 16-18.) Noel's foster mother confirmed this evaluation in her description of his disturbed behavior in her home. (Tr.

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663-683.) It was undisputed that Noel desperately needs the stability and continuity of a single caretaker. (Tr. 22.)

Prior to the filing of the petition seeking termination of her parental rights, Mrs. Maffey decided to place her three children, Tonya, Noel, and Sonny, for adoption. Her caseworker advised her to retain custody of Sonny and assisted her in planning for the relinquishment of Tonya and Noel. Subsequently, she changed her mind about placing Noel for adoption, although she proceeded with her plans for adoption of Tonya. (Tr. 797-800, 874-878.) These termination proceedings followed. At the trial Mrs. Maffey's adoptive mother testified in favor of termination of Mrs. Maffey's parental rights to Noel. (Tr. 723-727.)

Contrary to appellant's contention, the trial court did not terminate Cheryl Maffey's parental rights under the preponderance of the evidence standard. The Circuit Court found by clear and convincing evidence that Cheryl Maffey was unfit by reason of conduct or condition seriously detrimental to the child and that integration of the child into her home was improbable in the foreseeable future due to conduct or conditions not likely to change. (Tr. 1154-55, 1159-60, 1168-69.) The court also found beyond a reasonable doubt that termination of the mother's parental rights was in the child's best interests. (Tr. 1156, 1168.)

ARGUMENT

The judgment in this case rests on an adequate non-federal basis.

This Court will not take jurisdiction to review a judgment when the highest court of the state delivers no opinion and it appears that the judgment might have rested upon an adequate non-federal ground. E.g., Durley v. Mayo, 351 U.S. 277, 281 (1956); Lynch v. New York ex rel. Pierson, 293 U.S. 52, 54 (1934). In Lynch, this Court stated:

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> "It is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the federal question was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it." 293 U.S. at 54.

In this case it does not appear affirmatively from the record that resolution of the due process question presented here was necessary to the determination of the Oregon Court of Appeals. Appellee does not dispute that appellant challenged the constitutionality of the preponderance standard in a timely fashion in the trial court, and properly renewed that challenge in the Oregon Court of Appeals. Nonetheless, the Court of Appeals could have disposed of the case on adequate non-federal grounds: that under any standard of proof, the evidence was sufficient to satisfy Oregon's substantive statutory standard for permanent termination of appellant's parental rights. In Oregon, on appeals in cases involving petitions to terminate parental rights, the appellate court examines the evidence de novo, while giving weight to the findings by the trial judge who had the opportunity to observe the witnesses and their demeanor in evaluating the credibility of their testimony. State ex rel Juv. Dept. v. Jones, 290 Or. 799, 810, 626 P.2d 882 (1981). In at least one previous appeal in a termination case, the Oregon Court of Appeals, upon de novo review of the record, found "that the state did in fact establish, not only by a preponderance of the evidence, but beyond any reasonable doubt" that the substantive statutory standards for termination had been satisfied. State ex rel Juv. Dept. v. Thomas T., 30 Or. App. 385, 390, 567 P.2d 135 (1977). Assuming that the court so found in the case at bar, the resolution of the federal question was unnecessary to the court's disposition of the appeal. In addition, the state court's finding of fact would not be reviewable by this Court. See, e.g., Fry Roofing Co. v. Wood, 344 U.S. 157, 160 (1953); Portland R. L. & P. Co. v.

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Railroad Commission, 229 U.S. 397, 411-12 (1913). This Court does not review state court findings that form merely the basis upon which the state court concluded that a federal issue need not be reached. See Grayson v. Harris, 267 U.S. 352, 358 (1925).

Because it does not appear affirmatively from the record that the judgment necessarily rests on the Oregon Court's resolution of the federal question, this Court should dismiss the appeal under Rule 12.1(b) of the Rules of this Court.

The judgment of the Oregon Court of Appeals should be affirmed.

As stated above, the record shows that the Oregon Court of Appeals may have decided this case on the adequate non-federal ground that the state's evidence satisfied any standard of proof, including beyond a reasonable doubt. If that premise is accepted, this Court should affirm, on the basis that the Oregon Court of Appeals, pursuant to factual findings not reviewable in this Court, properly terminated the parental rights of Cheryl Maffey under Oregon's substantive standards for termination.

If this Court accepts review, this case should be consolidated for purposes of oral argument with Santosky v. Kramer, No. 80-5889.

On March 23, 1981, this Court granted the petition for certiorari in Santosky v. Kramer, 49 U.S.L.W. 3710. That case raises the question whether Section 622 of the New York Family Court Act is unconstitutional because it permits the Family Court to terminate parental rights upon a "fair preponderance of the evidence." If this Court accepts review in the case at bar, appellee respectfully moves, pursuant to Rule 37.3 of the Rules of this Court, that the present case be consolidated with Santosky v. Kramer for purposes of oral argument.

The question of the standard of proof mandated by the Due Process Clause in cases involving termination of parental rights is of substantial importance to the states. This Court has observed

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that the determination of the child custody is traditionally the exclusive province of state courts. See Popovici v. Agler, 280 U.S. 379, 383 (1930); Ex parte Burrus, 136 U.S. 586, 593, 594 (1890). The various state statutory schemes permitting permanent termination of parental rights vary significantly. See Wald, State Intervention on Behalf of 'Neglected' Children: Standards for Removal of Children from Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights, 28 Stan. L. Rev. 623, 633-36 (1976). In the context of involuntary civil commitment, this Court recently noted that the fact that some states legislatively or judicially had adopted a standard of proof greater than that required by the Due Process Clause did not assure

> * * * * that the more stringent standard of proof is needed or is even adaptable to the needs of all states. The essence of federalism is that states must be free to develop a variety of solutions to problems and not be forced into a common, uniform mold. As the substantive standards for civil commitment may vary from state to state, procedures must be allowed to vary so long as they meet the constitutional minimum." Addington v. Texas, 441 U.S. 418, 431 (1979).

Addington v. Texas, and earlier cases such as Mathews v. Eldridge, 424 U.S. 319 (1976), indicate that the determination whether a particular practice comports with due process must not be made in a vacuum. Rather, the Court must evaluate the practice in relation to the larger body of procedures of which it forms but a part, and consider whether the procedure as a whole satisfies the Due Process Clause. For instance, in deciding the requisite standard of proof for termination of parental rights, the Court must not ignore the differing substantive standards for termination enacted by the 50 states, and the equally diverse procedures by which the courts of the states adjudicate cases under those standards. Compare, e.g., N.Y. Family Court Act §§ 611, 614 and N.Y. Social Services Law § 384-b with Or. Rev. Stat. § 419.523. In addition, it is important to weigh the effect of administrative policies and procedures which lead to the decision to seek termination of parental rights.

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In recent years Oregon has been a nationally-recognized innovator in this area, with its revolutionary Oregon Project. See Maluccio, Fein, Hamilton, Klier, & Ward, Beyond Permanency Planning, Child Welfare (November 1980); Foster Care Reform in the 70's (Final Report, Permanency Planning Dissemination Project).

Consolidation of this case with Santosky v. Kramer would serve to highlight for this Court the distinctions among various state procedures and practices in the field of termination of parental rights. It would enable the Court better to evaluate the minimum requirements of due process in this difficult and sensitive area. By expanding its review to include the statutory scheme of more than one state, the Court will facilitate the formulation of constitutional guidelines which do not unduly hamper the flexibility of the states to develop new approaches which achieve the proper balance between parental interest and the state's interest and duty to protect children and to provide those children with a nurturing environment.

CONCLUSION

For the reasons stated above, this appeal should be dismissed, or in the alternative, the judgment of the Oregon Court of Appeals should be affirmed. If this Court accepts review, this case should be consolidated, for purposes of oral argument, with Santosky v. Kramer, No. 80-5889.

Respectfully submitted,

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